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October 9, 1987

FEDERAL EXPRESS
AIRBILL NO. 141093304

Ms. Beverely Shorty
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Re: Gary Development Company, Inc.
Docket No. RCRA-V-W-86-R-45

Dear Ms. Shorty:

Enclosed for filing is an original and one copy of Gary Development's Reply Brief. Please return one file-marked copy in the enclosed envelope.

Very truly yours,

PARR, RICHEY, OBREMSKEY & MORTON

By Warren D. Krebs

WDK/lh
Enclosures

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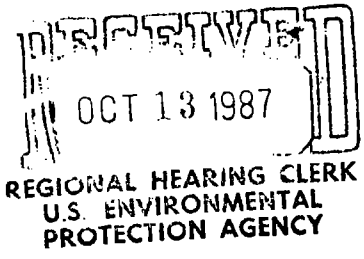
October 9, 1987



FEDERAL EXPRESS
AIRBILL NO. 141093562

The Honorable J. F. Greene
Administrative Law Judge (A-110)
U.S. Environmental Protection Agency
Washington, D. C. 20460

Re: Gary Development Company, Inc.
Docket No. RCRA-V-W-86-R-45

Dear Judge Greene:

Although I had thought the Region V brief regarding Gary Development's Motion to Dismiss was due October 5, I did not receive it until October 7 by Express Mail. As I recall, Gary's reply brief is due to be filed by Monday, October 12, but evidently this is a federal holiday. To ensure timely delivery, I am sending you this reply brief by Federal Express. I would appreciate your returning to me a file-marked copy in the enclosed envelope. Of course, we are also filing a copy with the Regional Clerk and serving a copy upon Region V's counsel.

Very truly yours,

PARR, RICHEY, OBREMSKEY & MORTON

By Warren D. Krebs

WDK/lh
Enclosures
cc w/enc: Beverely Shorty, Regional Clerk
Marc M. Radell, Assistant Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Washington, D. C.

IN THE MATTER OF	)	
	)	
GARY DEVELOPMENT COMPANY, INC.,	)	DOCKET NO. RCRA-V-W-86-R-45
	)	
Respondent.	)	

REPLY BRIEF TO COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

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Attorneys for Respondent
Gary Development Company, Inc.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Washington, D. C.

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	)	
Respondent.	)	

Summary of Argument

Respondent Gary Development Company, Inc. (hereinafter called "GDC") has raised the lack of jurisdiction both in its Request for Hearing and Answer and Responsive Pleading filed July 1, 1986, to the Complaint and Compliance Order and also during its opening statement at the commencement of the trial on September 8, 1987. Paragraph 1 of the Answer states:

> Gary denies the jurisdictional summary set forth at page 2 of the Complaint, objects to the Region V alleged attempt to enforce regulations of the state of Indiana, and disputes both the subject matter and personal jurisdiction of Region V.

Region V's claim of jurisdiction as set forth at page 2 of the Complaint is based upon its contention that Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), "provides that U.S. EPA may enforce State regulations in those States authorized to administer a hazardous waste program." EPA's Complaint admits the state of Indiana was granted Phase I Interim Authorization by the Administrator "to administer a hazardous waste program in lieu of the Federal program" on August 18, 1982, and was subsequently granted final authorization on January 31, 1986. (Complaint, p. 2) Region V's proposed Compliance Order would

require GDC to do a multitude of items set forth in six pages of the Complaint, including, but not limited to, submitting "a closure plan and post-closure plan to the Indiana Department of Environmental Management (IDEM), with a copy to the Complainant in accordance with 320 IAC 4.1-21 and 4.1-28 which will result in closure of the [entire] facility." The Complaint states that "[t]he plans must (1) describe activities which will meet the requirements for landfill closure and post-closure care (320 IAC 4.4-28-4), (2) indicate how they will be achieved, (3) schedule the total time required to close the facility (320 IAC 4.1-21-3(a)(4)), and (4) describe continued post-closure maintenance and monitoring for a minimum of thirty (30) years after the date of completing closure. Indeed, Section B on page 14 of the Complaint's Order states:

> Respondent shall, within thirty (30) days of this Order becoming final, submit to U.S. EPA and IDEM for approval, a plan and implementation schedule (not to exceed 120 days) for a ground-water quality assessment program to be put into effect at Respondent's landfill

It even sets forth specific requirements for the plan including (1) the methodology to be used for investigation of geology and subsurface hydrology, (2) the location, depth and construction specifications for monitoring wells, (3) the types of hazardous waste constituents which must be analyzed in groundwater, and (4) the specifics of a sample collection plan. Paragraph E orders GDC to submit the results of groundwater quality assessment to both "IDEM and to the U.S. EPA," and Section G states: "The Respondent shall notify U.S. EPA in writing upon achieving compliance with this Order and any part thereof." Lastly,

although attempting to "enforce" Indiana law, the Complaint assesses a federal penalty of $117,000 against GDC under RCRA.

GDC's jurisdictional argument made during its opening statement with its motion to dismiss was made before the taking of any evidence and is two-pronged. Firstly, EPA has precluded itself from bringing closure proceeding actions where a state has received the appropriate authorization under RCRA to commence closure proceedings within its jurisdiction. Secondly, the related doctrines of res judicata and collateral estoppel bar this action because the state of Indiana has previously entered into a consent agreement and order as to the manner in which GDC's facility shall be constructed and operated.

A. EPA Has Precluded Itself From Bringing Closure Proceeding Actions Where A State Has Received The Appropriate Authorization Under RCRA To Commence Closure Proceedings Within Its Jurisdiction.

Region V's attempted utilization of RCRA Section 3008(a)(2) to determine closure obligations of a facility under the disguise of an enforcement action and to compel a facility to implement state closure requirements for the entire area of the facility is antithetical to both a 1986 RCRA appeal order rendered by U.S. EPA Administrator Lee M. Thomas and to arguments made to the United States Circuit Court of Appeals for the Seventh Circuit by the United States Justice Department on behalf of U.S. EPA and Administrator Thomas.

In RCRA Appeal 84-4, Administrator Thomas addressed the specific issue raised in this case as to whether EPA maintained

jurisdiction to bring closure proceedings against facilities located within states having interim status authorization and to initially determine closure obligations including which areas of a facility are subject to closure. Region V had on October 12, 1984, not only denied the hazardous waste Part B permit application of Northside Sanitary Landfill, Inc., but also terminated Northside's interim status and ordered it to "immediately commence closure proceedings as required under the Indiana hazardous waste rules (320 IAC 4)." Region V's Comments attached to its denial stated that "[t]he entire hazardous waste management landfill area outlined in the November 18, 1980, Part A permit application must be closed" rather than the much smaller 12-acre tract of the facility where RCRA hazardous wastes had been disposed after November 18, 1980. Northside appealed this decision to the Administrator. On April 3, 1985, Administrator Thomas issued his Order Denying Review in RCRA Appeal No. 84-4, affirming the Region V decision to include Northside's Old Farm Area as part of the facility subject to closure. Mr. Thomas held at page 2 of this Order:

> The location and dimensions of a hazardous waste facility are probably two of the most rudimentary pieces of information that go into a proper permit decision. If the permit decision does not identify where the facility is located, or how big it is, the permit decision cannot be implemented successfully regardless of the outcome of the decision. This is particularly apparent in the present case, for either including or excluding the Old Farm Area will significantly alter the area of Petitioner's landfill that is subject to the closure and post-closure requirements of the regulations, 40 CFR Part 265 (Subpart G). (emphasis added)

Northside [by this attorney] appealed the Administrator's Order to the United States Court of Appeals for the Seventh Circuit arguing deprivation of federal administrative appeal and review under provisions of RCRA which require an evidentiary hearing, deprivation of review under the Administrative Procedure Act, deprivation of due process, and that the closure order for the entire facility was unsupported by substantial evidence and contrary to the facts. Thirty days after Northside had filed and served its brief setting forth the specific statutes, case law, and facts supporting its appeal, and just ten days before the filing of EPA's brief with the Court, Administrator Thomas issued his Order on Reconsideration in RCRA Appeal No. 84-4 on November 27, 1985. Specifically quoting the section of his original Order Denying Review set forth above in this Brief, the Administrator reversed his decision as to the appropriateness of Region V's determination of Northside's closure obligations. The Administrator specifically discussed the jurisdiction for closure determinations under RCRA Section 3006 and the "crucial distinction between permit determinations, which decide whether and under what conditions waste may be managed on the property, and closure determinations, which are concerned with **which areas** were used for hazardous waste management and **what specific technical requirements**, such as cover or maintenance requirements, should apply to those areas." (underline by Administrator) Mr. Thomas held in this new Order:

> Any such construction of this language is in error in the context of this case because Indiana has been granted the authority to make the closure determination pursuant to §3006 of RCRA, a fact that was not brought

to light in the parties' original submissions. Sections 3006(b) and (c) provide that when a qualified state receives authorization the federal program is suspended and the hazardous waste program operates under state law. In this instance, Indiana received a so-called Phase I authorization on August 18, 1982, which gave the state the necessary authority to approve the closure plan of any facility whose permit application has been denied by EPA. See 40 CFR §271.128(e)(2). Under a Phase I authorization EPA retains the authority to issue permits and, therefore, was the proper authority to issue the permit denial. However, because of the Phase I authorization, EPA was not the proper authority to decide which areas of the facility should close -- Indiana was. (Order on Reconsideration, pp. 4-5) (emphasis added)

***

In view of the foregoing, Petitioner's claim that it has been denied an adequate hearing on the closure determination must be rejected. Indiana, not EPA, has the authority to approve Petitioner's closure plan, including the responsibility to decide which areas of the facility have to comply with specific closure requirements such as the requirement for a final cover. Because state law has superseded the federal closure requirements, 40 CFR Part 265 (Subpart G), the closure proceedings will take place under the procedures established by the Indiana regulations corresponding to the federal requirements, and the closure plan must comply with the standards set out in Indiana law. Petitioner will therefore have the opportunity to present its arguments to the state. The Region's statement that the Old Farm Area must close cannot be viewed as a final action imposing closure obligations on Petitioner, for the statement is without legal effect as previously stated.

Granting Petitioner an additional hearing in a federal administrative forum would not only call the state's authority into question -- by requiring EPA to decide a state law matter -- but would also undoubtedly duplicate the efforts of state officials. Inasmuch as Petitioner does not challenge its permit denial but wishes only to be heard on the issue of its closure obligations, no purpose would be served by the submission of such evidence in a federal rather than a state proceeding. Indeed, Petitioner admits that some of the information it wishes to submit to EPA has already been submitted in state proceedings. The state administrative agency therefore provides the proper forum for resolving questions about Petitioner's closure obligations.[9]

---

[9]When a state has been authorized to administer some but not all of the hazardous waste management program, EPA should attempt to organize administrative procedures so as to avoid conflict with state decision-making authority and minimize duplication and overlap as much as possible.

(Order on Reconsideration, pp. 6-8)

The Justice Department on behalf of EPA and its Administrator successfully argued to the Court of Appeals that the Order on Reconsideration was of such importance that it should be added to the administrative record even though the decision under appeal was made long before the issuance of the Order on Reconsideration. The Justice Department on behalf of EPA and Mr. Thomas argued the complete lack of EPA authority and jurisdiction in its Brief to the Seventh Circuit Court:

Pursuant to section 3006 of RCRA, 42 U.S.C. § 6926 (1982), as amended, a state which satisfies necessary requirements will be authorized by EPA to administer and enforce a RCRA hazardous waste program within its borders in lieu of a federal program.[11]

---

[11]This is not a discretionary delegation of federal powers; rather, the federal program is suspended, and the program operates under state law. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. 29 (1976).

(Brief of U.S. EPA in Cause No. 85-2119 before the United States Court of Appeals for the Seventh Circuit, p. 20)

* * *

Because Indiana is solely responsible for approving Northside's closure plan, Indiana is free to impose closure requirements in accordance with its laws, and EPA's role, if any, in this process would be no more than an advisory or consultative one. (EPA Brief, p. 21)

* * *

> Closure determinations are likely to be more limited in scope than permit determinations. Although a facility as a whole is subject to interim status and to the Act's permit application requirement, the actual conditions of the permit (for permitted facilities) or the specific requirements of the interim status regulations (for facilities operating under interim status) determine which geographic areas of the facility are subject to the technical requirements of the regulations. (EPA Brief, pp. 28-29)

* * *

> Northside, by requesting a new hearing, essentially seeks an opportunity to use EPA's permit application proceeding so as to preempt or collaterally attack Indiana's decisionmaking authority in the state closure proceeding. In other words, although Northside no longer even wants a permit, it seeks to compel EPA to make findings or statements in the permit application proceeding which it can then attempt to use to its advantage in any state administrative review or judicial review proceeding involving its closure plan. This is impermissible. Once a state has received Phase I authorization, it is responsible for making closure determinations, and EPA cannot legally commit the state to make any particular determinations. See Administrator's Order on Reconsideration.
>
> The result which Northside ultimately wants -- a determination that only a small portion of its facility should be subject to closure -- is one which it must seek from Indiana. It can make its arguments before the state agency and present any evidence which it believes is probative. Moreover, it can pursue its remedies under the administrative review and judical review provisions of Indiana law. (EPA Brief, p. 33) (all emphasis added)

The Seventh Circuit denied Northside's Petition for Review and its Request that it order EPA to conduct an evidentiary hearing, having accepted EPA's position that the extent of Northside's closure obligations was an issue to be determined by the state of Indiana and that Northside would have due process remedies under administrative review and judicial review provisions of Indiana

law. The Seventh Circuit held in Northside Sanitary Landfill, Inc. v. Lee M. Thomas, 804 F.2d 371, 381-382, on October 23, 1986:

> Once the state agency has received authorization for its program, it shall "carry out such program in lieu of the Federal program." 42 U.S.C. § 6926(a). The EPA simply does not have the legal authority to determine whether, for what purposes, or which areas of Northside's facility must be closed. See 40 C.F.R. § 265.1(c)(4). The State of Indiana alone is responsible for these determinations. Even if the EPA is dissatisfied with, for example, the enforcement action taken by a state against a specific hazardous waste disposal facility, or the settlement agreement reached between the state and the facility, so long as the state has exercised its judgment in a reasonable manner and within its statutory authority, the EPA is without authority to commence an independent enforcement action or to modify the agreement. Cf. Shell Oil Co. v. Train, 585 F.2d 408, 414 (9th Cir. 1978) (EPA recommendation that state deny NPDES variance request constituted advice to state, and was not reviewable in federal court). (emphasis added)

EPA and the Justice Department advocated this position to the Court even providing the Court with the adopted authority of Shell Oil Co. v. Train. (See EPA Brief, pp. 22-23) The Seventh Circuit Court further held at 382:

> In the instant case, the disputed remarks of the EPA arose as responses to comments made by a representative of Northside at the public hearing held on the denial of Northside's Part B application. Participants at the hearing were allotted only five minutes to comment upon the proposed permit denial. Hence, it is clear that the parties were not given a full and fair opportunity to litigate the issue of which areas of Northside's facility were subject to closure. More important, because, as we noted above, the EPA did not have the authority to make closure findings and determinations, these issues were not properly before it. Hence, Northside cannot claim that it has been injured by the allegedly preclusive effect of the EPA's statements. Brotherhood of Locomotive Engineers v. ICC, 761 F.2d 714 (D.C. Cir. 1985) (emphasis added).

Most interesting in connection with Region V's Complaint and Compliance Order against GDC is the final paragraph of the Seventh Circuit's decision:

> Distilled to its essence, Northside's argument asks us to either determine the proper scope of closure or to order the EPA to hold a formal evidentiary hearing for it to do so. Neither is a remedy that we have the authority to grant. We do, however, caution the Administrator against commenting on the scope of closure in a case such as this where a state agency has the sole authority to decide such matters. Even though the Administrator's comments in these regards are not legally binding on the state agency, they may give rise to delicate questions of the state agency's exercise of independent judgment. The Administrator must bear in mind the sensitive relationship existing between it and state agencies.

Id. at 386.

Ignoring Administrator Thomas's Order on Reconsideration of November 27, 1985, which reversed Region V's prior interference into the state of Indiana's "sole authority" and independent judgment to determine the scope of closure and closure obligations, and totally contrary to the decision of the Seventh Circuit issued October 29, 1986; Region V issued this Complaint and Compliance Order against GDC on May 30, 1986, determining "whether, for what purposes, and which areas of [Gary's] facility must be closed." Indeed, the Region V Order is not even limited to whether GDC is obligated to proceed through closure and which of its areas, but sets forth timetables and criteria which GDC is being required to utilize. As to GDC, Region V has admitted in its Complaint that interim status facilities in Indiana are regulated under the Indiana regulations "rather than the Federal regulations set forth at 40 CFR Part 265." (Complaint, p. 2)

Most incredible is the fact that Region V has issued such a closure order where it alleges that the facility never had interim status subject to termination and never had submitted a permit application which would be subject to EPA's jurisdiction before it had "retained the authority to issue permits." (See Administrator's Order on Reconsideration, pp. 4-5)

In Heckler v. Chaney, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), the United States Supreme Court heldat 1656:

> The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543, 98 S.Ct. 1197, 1211, 55 L.Ed.2d 460 (1978); Train v. Natural Resources Defense Council, 421 U.S. 60, 87, 97 S.Ct. 1470, 1485, 43 L.Ed.2d 731 (1975).

In Northside, the agency by its present Administrator, interpreted the RCRA statutes as to the proper jurisdiction to determine one's obligations for closure and the scope of closure. Its interpretation was accepted by the Seventh Circuit Court of Appeals, but only with that Court admonishing the Administrator not to interfere with the state agency's "sole authority" and to recognize the "sensitive relationship existing between it and state agencies." Merely because Indiana has exercised its "independent judgment" and not determined GDC subject to RCRA type closure is an insufficient reason for Region V's ignoring of Administrator Thomas's Order and the Circuit Court's decision. In fact, recognizing the existence of a presumption of unreview-

ability of decisions of agencies not to undertake enforcement actions, Justice Rehnquist writing for the Supreme Court majority in Heckler v. Chaney, 105 S.Ct. 1649, 1656 stated:

> Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of the prosecutor in the Executive Branch not to invite, a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.

Region V makes only one contention as a response, i.e., the present litigation is an enforcement action, not a determination regarding closure; and, somehow, an unpublished order by a federal district court and an unpublished decision by an EPA administrative law judge have precedence over the determinations and clear language of both the Administrator and the Seventh Circuit Court of Appeals. Neither the Seventh Circuit's opinion nor the U.S. Justice Department arguments on behalf of Administrator Thomas and EPA were "limited to restricting U.S. EPA's review of closure plans in authorized states" as now contended by Region V. As discussed in more detail previously, the Circuit Court nowhere limited its decision to the issue of EPA's review of the technical aspect of closure plans, but instead held:

> The EPA simply does not have the legal authority to determine whether, for what purposes, or which areas of Northside's facility must be closed. See 40 C.F.R. § 265.1(c)(4). The State of Indiana alone is responsible for these determinations. Even if the EPA is dissatisfied with, for example, the enforcement action taken by a state against a specific hazardous waste disposal facility, or the settlement agreement reached between the state and the facility, so long as the state has exercised its judgment in a reasonable manner and within its statutory authority, the EPA is without authority to commence an independent enforcement action

or to modify the agreement. Cf. Shell Oil Co. v. Train, 585 F.2d 408, 414 (9th Cir. 1978)

Northside, 804 F.2d at 381-382. Obviously, the Seventh Circuit held based upon the arguments by the U.S. Justice and the Administrator's Order on Reconsideration that EPA was precluded from all aspects of closure especially as to determining whether closure even applied to a facility and what areas of a facility might be subject to closure. Obviously, the Court held that EPA could not subvert the state's "sole authority" and "independent judgment" by bringing "an independent enforcement action which is merely a disguised threshold determination of the applicability and scope of closure." This is precisely what Region V's Complaint attempts to due by bringing an "enforcement action" attempting to make GDC's entire facility subject to state closure regulations and attempting to dictate the specific timetables for filing and the contents of related closure plans and assessments.

The Seventh Circuit held that EPA may not interfere with the state unless it has not "exercised its judgment in a reasonable manner and within its statutory authority." Northside, 804 F.2d at 382. This holding is consistent with the legislative history of RCRA as to federal enforcement actions:

> This legislation permits the states to take the lead in the enforcement of the hazardous wastes laws. However, there is enough flexibililty in the act to permit the Administrator, in situations where a state is not implementing a hazardous waste program, to actually implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements. Although the Administrator is required to give notice of violations of this title to the states with authorized state hazardous waste programs the Administrator is not prohibited from acting in those cases where the state fails to act, or from withdrawing approval of the state

> hazardous waste plan and implementing the federal hazardous waste program pursuant to title III of this act.

5 U.S. Code Cong. & Admin. News at 6269 (1976) (emphasis added). Contrary to the facts of the Order in United States v. Conservation Chemical Co. of Illinois, Civ. No. H86-9 (ND Ind.) (cited as authority by Region V), there exists no evidence in the GDC administrative record that the state of Indiana failed to exercise its judgment in a reasonable manner and within its statutory authority as to GDC, nor evidence that the state is not implementing a hazardous waste program and that its program does not meet the federal minimum requirements. Region V has already rested its evidentiary case, without offering any such evidence. To the contrary, the court in Conservation Chemical found determinative EPA's submission of a letter dated February 25, 1986, from the Indiana Attorney General informing the defendant that the Land Pollution Control Division of the Indiana Environmental Management Board (IEMB) was putting its administrative enforcement action "on hold" pending the outcome of the EPA litigation before the district court. This court discussed the significance of this letter twice in its Order at pages 17 and 18 and again at page 23. This court found this to be the distinguishing factor between Conservation Chemical and Northside concluding:

> In Northside, the court [Seventh Circuit] stated that as long as the state has acted reasonably in enforcing its program, the EPA should not interfere. 804 F.2d at 382

(See Appendix 3, p. 23, to Region V's Response to Motion to Dismiss).

Indeed, as will be discussed in more detail below, the IEMB (subsequently the Indiana Department of Environmental Management (IDEM)) during February, 1983, and again as late as September 30, 1986, which is five months after Region V issued its Complaint, had entered into, interpreted, and enforced a legally binding Settlement Agreement and Agreed Order "govern[ing] construction and operations at the [GDC] site." (See Respondent's Exhibits 4 and 9) The IDEM Findings in N-146 of September 30, 1986, reflect that the full IEMB, which was the ultimate authority of the agency, conducted a hearing regarding GDC on November 15, 1985, and remanded for an additional evidentiary hearing. This additional hearing was actually taking place during the time that Region V issued its Complaint. (Respondent's Exhibit 9, Findings 14, 15, and 16 and Discussion on p. 9) Also, the Order in Chemical Conservation reflects that the district court was evidently not apprised of the specifics of Administrator Thomas's Order on Reconsideration nor as to the U.S. Justice Department's written and oral arguments made to the Seventh Circuit. Neither are discussed nor even referenced in the Court's Order.

B. The Related Doctrines of Res Judicata And Collateral Estoppel Bar This Action Because The State Of Indiana Has Previously Entered Into A Consent Agreement and Order As To The Manner In Which GDC's Facility Shall Be Operated.

Because Region V as a federal agency has filed a complaint for the purpose of making GDC obligated to certain regulations of the state of Indiana, both the federal and state of Indiana principles of res judicata and collateral estoppel are applicable. Although the federal and state laws are similar on these legal issues, federal courts recognize even the concept of offensive estoppel rather than only defensive estoppel. The federal law of res judicata, its applicability and its importance were set forth by the Supreme Court of the United States in Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). Writing the majority opinion from which only one justice dissented, now Chief Justice Rehnquist discussed this doctrine:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. County of Sac, 94 U.S. 351, 352-353 (1877). Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. Angel v. Bullington, 330 U.S. 183, 187 (1947); Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); Wilson's Executor v. Deen, 121 U.S. 525, 534 (1887). As this Court explained in Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 325 (1927), an "erroneous conclusion" reached by the court in the first suit does not deprive the defendants in the second action "of their right to rely upon the plea of res judicata. . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral

> attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." We have observed that "[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert." Reed v. Allen, 286 U.S. 191, 201 (1932).

In Federated, the Ninth Circuit Court of Appeals had reversed the district court's dismissal of anti-trust claims on the basis of res judicata. The Court of Appeals had determined that the first trial court dismissal of the action, which dismissal was subsequently the reason for dismissing a second action on the basis of res judicata, was erroneous "because the instant dismissal [the first one] rested on a case that has been effectively overruled" by a U.S. Supreme Court decision issued while the appeal was pending before the Ninth Circuit. The Ninth Circuit held that under these circumstances, the doctrine of res judicata must give way to "public policy" and "simple justice." Eight Supreme Court Justices disagreed, and the Supreme Court held in Federated, at 401:

> The Court of Appeals also rested its opinion in part on what is viewed as "simple justice." But we do not see the grave injustice which would be done by the application of accepted principles of res judicata. "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." Heiser v. Woodruff, 327 U.S. 726, 733 (1946). The Court of Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled

as between the parties." Baldwin v. Traveling Men's Assn., 283 U.S. 522, 525 (1931). We have stressed that "[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . ." Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917). The language used by this Court half a century ago is even more compelling in view of today's crowded dockets:

> "The predicament in which respondent finds himself is of his own making . . . . [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of res judicata, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation--a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship." Reed v. Allen, 286 U.S., at 198-199.

Thus, the Supreme Court has recognized no exception to following the principle of res judicata; that it serves vital public interest; that it precludes not only issues raised, but all issues which "could have been raised"; and that it is applicable not only to the parties to the litigation, but also "their privies." Privity exists in this pending litigation because EPA has admitted to granting the state of Indiana both Phase I interim authorization and final authorization to administer a hazardous waste program in lieu of the federal program and has brought this action for the purpose of obligating GDC to and compelling it to comply with hazardous waste regulations of the state of Indiana. (Complaint, p. 2) Indeed, Region V's Order requires GDC to submit plans and assessments to both U.S. EPA and

the Indiana Department of Environmental Management "for approval." (Complaint, pp. 13, 14 and 17) Thus, EPA is barred by the principle of res judicata from litigating any issue which was or could have been raised in prior litigation between GDC and the state of Indiana's environmental agency, and this is so even if the state judgment was erroneous or even rested on a legal principle subsequently overruled in another case.

Both GDC and Region V have offered into evidence the Settlement Agreement and Recommended Agreed Order in Cause No. N-53 before the Environmental Management Board captioned In the Matter of Gary Development, Inc., Petitioner, v. Environmental Management Board of the State of Indiana, Respondent. (Respondent's Exhibit 4 and Complainant's Exhibit 4) The copy of this Settlement Agreement offered by Respondent under certification of James M. Garrettson, Administrative Law Judge of the Indiana Department of Environmental Management, shows on its face it was recommended for adoption by Mr. Garrettson and was approved and entered into by the IEMB through its Technical Secretary on February 18, 1983. The IEMB was during 1983 the ultimate authority of the state's environmental agency, and the Technical Secretary was the highest staff official for that agency. I.C. 13-7-2-1, -2, and -6. (These statutes were repealed by the Indiana General Assembly effective July 1, 1986, due to the creation of the successor agencues, Indiana Solid Waste Management Board and the Indiana Department of Environmental Management.) The Settlement Agreement also states that the IEMB was represented by the Attorney General of Indiana who also approved

the Agreed Order for "legality and form." The Attorney General is the state's chief law enforcement officer.

The Settlement Agreement and Agreed Order modified GDC's modified construction permit and operating permit issued by the state of Indiana and states it "shall govern construction and operations at the site from the date this Recommended Agreed Order is approved by EMB." (Agreed Order, p. 3) The Agreed Order sets forth many items encompassed by Region V's Compliance Order including installation of a leachate collection system; a perimeter seal; the number, location, frequency of testing, and parameters to be tested at facility monitoring wells; established permeability for the site's clay perimeter walls; continuing jurisdiction of the state hearing officer to determine any necessary remedial action, and permission to receive specified "special wastes" regulated by the state. Although Region V has contended that this Agreed Order has nothing to do with the regulation of hazardous wastes, the Order at page 7 specifically cites I.C. 13-7-11-3 (1982) which is a statute providing for hearings under Chapter 11 which is entitled Enforcement under the Indiana Environmental Management Act, which was then found between I.C. 13-7-1-1 and 13-7-19-3. The Agreed Order also references 320 IAC 4-3 which is a portion of an Indiana regulation entitled Hazardous Waste Management Permit Program and Related Hazardous Waste Management Requirements and which article specifically includes as its purpose:

> protecting and enhancing the quality of Indiana's environment and protecting the public health, safety, and well-being of its citizens and establishing a hazardous waste management program consistent with the

> requirements of the Resource Conservation and Recovery Act (P.L. 94-580), as amended including the amendments made by the Solid Waste Disposal Act amendments of 1980 (P.L. 96-482).

320 IAC 4-1-1. Thirdly, this Agreement and Order is incorporated as part of the report entitled Inspection of Ground-Water Monitoring Program performed by EPA's consultant Harding & Lawson Associates which Region V's Complaint states was a basis for its allegations against Gary. (Complaint, pp. 2 and 7-10; Complainant's Exhibit 4) Lastly, but not necessary because the Agreed Order specifically references the Indiana agency and regulations dealing with hazardous waste, the Supreme Court has held that res judicata applies to not merely issues raised, but also issues which "could have been raised." Obviously, the Environmental Management Board as the ultimate state authority for regulating the environment could have raised in 1982 and 1983 any issues including closure. Region V admits in its Complaint that Indiana was granted Phase I interim authorization by its Administrator to administer a hazardous waste program in lieu of the federal program as of August 18, 1982, which was six months prior to the effective date of the N-53 Agreed Order.

Furthermore, Indiana has continued to exercise jurisdiction over GDC as to both its construction and operations. Respondent's Exhibit 9 is a copy of the Recommended Findings of Fact, Conclusions of Law and Order of the state administrative law judge in Cause No. N-146 before the Indiana Department of Environmental Management captioned Gary Development Company, Inc., Petitioner, v. Indiana Department of Environmental Manage-

ment, Respondent issued September 30, 1986, which is five months after Region V issued its Complaint. This Order was issued by Judge James M. Garrettson who also certified the authenticity of the document. This is the same Mr. Garrettson who appears as the hearing officer in Cause No. N-53, and the Settlement Agreement and Order in Cause No. N-53 is specifically referenced in paragraph 7 on page 2 of the N-146 Findings, and indeed, is extensively quoted at Finding 17 on pages 3 through 7. Most interesting are Supplemental Findings of Fact 2 and 3 which together conclude that between September, 1984, and the date of the second administrative evidentiary hearing on June 5, 1986, GDC's facility had been inspected by staff of the Indiana State Board of Health on 28 times and 20 of those inspections resulted in acceptable ratings. (By statute, the ISBH staff served as the IEMB staff. I.C. 13-7-2-2 and -6) Nevertheless, Region V's Complaint at the end of this inspection period states on page 1 that it was based on information including "an inspection report and correspondence from the Indiana State Board of Health (ISBH)." (Complaint, p. 1) This not only contradicts Region V's statement that "based on the review of these documents, violations of applicable state and federal regulations have been identified," but certainly establishes the privity between the state and U. S. EPA. In fact, references to the state are throughout the EPA Complaint including:

> paragraph 10 - "Pursuant to Title 320, Indiana Administrative Code (IAC) 4.1-10-2, generators of hazardous waste in Indiana must submit to the Technical Secretary of the Indiana Environmental Management Board (EMB) by annual reports which specify to whom their hazardous wastes have been sent in the preceding calendar year"

and sets forth information from annual reports for Indiana Harborworks (LTV Steel) and American Chemical Service.

paragraph 10(c) - "Hazardous waste listed at 320 IAC 4.1-6-2."

paragraph 10(d) - "ISBH inspection of June 17, 1985" and "ISBH memorandum dated July 29, 1985."

paragraph 14 - "In a letter dated May 5, 1985, ISBH notified respondent of violations of financial assurance requirements discovered during a records review on March 26, 1985. No hazardous waste facility certificates of liability insurance have been received at ISBH as required by 320 IAC 4.1-22-24(a) and (b)."

paragraph 15 - "An inspection performed by ISBH on June 17, 1985, found the following violations at respondent's facility."

paragraph 16 - "On March 29, 1985, ISBH sent a letter to respondent notifying the facility of lack of compliance with requirements."

paragraph 17 - "ISBH received an inadequate response from respondent."

The Region V Order even requires GDC to prepare several plans and assessments and to submit them to both U.S. EPA and IDEM "for approval." Therefore, there is no doubt as to the privity between EPA and the state of Indiana environmental agencies, nor as to the fact that at the time EPA's Complaint and Compliance Order was issued directing the manner of operations of GDC's facility, litigation was pending between GDC and the Indiana Department of Environmental Management as to GDC's construction and operation of its facility. The elimination of such duplicative litigation was the "vital public interests" which Chief Justice Rehnquist held was the basis for not rejecting the "salutary principle of res judicata.

Related to the doctrine of res judicata is the doctrine of collateral estoppel. The Supreme Court has held that this doctrine "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). In 1971, the U.S. Supreme Court determined the mutuality doctrine which prevented a party from using a prior judgment as an estoppel against another unless both parties were bound by the judgment was improper law. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 334, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). Nevertheless, mutuality exists here due to the privity between the state and EPA established by RCRA, the Indiana Environmental Act and Regulations and the Complaint itself. The Supreme Court in Parklane Hosiery, supra, at 332-333, held that:

> Since the petitioners received a "full and fair" opportunity to litigate their claims in the SEC action, the contemporary law of collateral estoppel leads inescapably to the conclusion that the petitioners are collaterally estopped from relitigating the question of whether the proxy statement was materially false and misleading [in a subsequent stockholders class action in the district court].

Region V's arguments against the applicability of res judicata and collateral estoppel are:

(1) Cause No. N-53 does not constitute a final judgment on the merits, but is only a settlement agreement reached before trial where no issues were ever litigated.

(2) The same parties were not involved because EPA was not a party to Cause No. N-53.

(3) Cause No. N-53 and the EPA Complaint do not arise from the same cause of action.

As to the first contention, because EPA is attempting to enforce Indiana law, the Indiana law of res judicata and promisory estoppel is applicable in addition to federal law. The Indiana Environmental Management Act itself provides for "agreed order[s]." I.C. 13-7-11-2(b). In Elder v. State Ex Rel. Department of Natural Resources, 482 N.E.2d 1383 (1985), the Indiana Court of Appeals unanimously held that a consent decree or agreed order has the same effect as a judgment after litigation, holding at 1389:

> A consent decree is in the nature of an agreement or contract to cease activities asserted as illegal by a governmental entity. Black's Law Dictionary 370 (5th ed. 1979)
>
> However, once sanctioned by the court it is an adjudication which has res judicata effect. 1BJ. Moore, Moores Federal Practice ¶0.409[5] (2d ed. 1984). Consequently, a consent decree is an unappealable final judgment:
>
> > "That the judgment was rendered by consent of the parties does not detract from its dignity, or lessen its conclusiveness as an adjudication between the parties, but the consent is a waiver of error precluding a review upon appeal."
>
> State v. Huebner, 230 Ind. 461, 468, 104 N.E.2d 385, 388 (1952); accord McNelis v. Wheeler, 225 Ind. 148, 73 N.E.2d 339 (1947).

The Court of Appeals in Elder at 1390 went on to hold:

> The trial court correctly found the consent decree "fully adjudicated the rights and responsibilities between the parties and constitute[d] a judgment on the

> merits." The express provisions of the consent decree extinguished any claim between the parties regarding the Elders' property.

The Court of Appeals in Elder upheld the trial court's granting of summary judgment in favor of the Indiana Department of Natural Resources in an action for damages against it for the taking of property for public use on the basis that damages were barred by a consent decree entered into during prior litigation where land had been conveyed to DNR in order for Elder to develop adjacent property without state permits.

As to Region V's second contention, being an actual party in the prior decision is unnecessary for the application of either res judicata or promissory estoppel. See Federated Department Stores, supra, and Parklane Hosiery, supra. The bar is applicable to those having privity with a party. Privity is simply defined in Black's Law Dictionary (Revised 4th ed.) as "derivative interest founded on, or growing out of, contract, connection, or bond of union between parties; "mutuality of interest;" or as "cognizance implying a consent or concurrence." Black's defines a privy as "one who is a partaker or has any part or interest in any action, matter, or thing." Region V begs the question by stating: "Nor was U.S. EPA privy to the Settlement Agreement" in Cause No. N-53. This is not the issue. The issue is whether privity exists between the state of Indiana's environmental agencies and EPA in the pending litigation, and if so, EPA is bound by the State's Agreed Order approved by the ultimate authority within the state's environmental agency. As discussed previously in this Brief, EPA's Complaint is replete with

references to the derivative interest growing out of the connection between EPA and the state of Indiana and their mutuality of interest in environmental regulation of GDC's facility.

Lastly, Region V merely argues that its action in Cause No. N-53 did not arise from the same cause of action. Nowhere in the decisions of the U.S. Supreme Court exists such an exception to the applicability of res judicata. The basis of the cause of action is not the issue, and if it were, it would totally defeat res judicata and estoppel because parties could simply continue to litigate in successive cases by merely developing new theories for new causes of action to reach the same result. In fact, the U.S. Supreme Court squarely addressed this contention, holding in United States v. Moser, 266 U.S. 236, 241, 45 S.Ct. 66, 69 L.Ed.2d 262 (1924), quoting from its prior decision in Southern Pacific Railroad Co. v. United States, 168 U.S. 1, 48:

> "'The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.'"

The Court in Moser went on to conclude at 242:

> But a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based.

The basis behind the State's original decision as to the facts and manner under which and the right of GDC to construct and operate its facility is irrelevant. The issue here is simply the manner in which GDC will be required to construct its facility and to operate. The State in February, 1983, entered into an Agreed Order "govern[ing] construction and operations at the site." Region V three years later issues a Compliance Order requiring a totally different type of construction and operation stating that GDC "must close its facility." All the alleged facts which EPA believes require the facility to close existed before the Agreed Order was issued and even before the litigation in Cause No. N-53 was commenced in February, 1982. Even if GDC had disposed of RCRA hazardous wastes between December 5, 1980, and the end of 1981 as alleged, this was an issue which could and should have been litigated in Cause No. N-53. Without question, hazardous waste disposal was certainly an issue because the Agreed Order states at paragraph 8(a) on page 7:

> The parties specifically agree that no "hazardous waste" as defined and identified in 320 I.A.C. 4-3 (1982 Cum. Supp.) (hereinafter called "RCRA hazardous waste") shall be deposited at Petitioner's landfill after the effective date of this Order.

Now, three years later, EPA desires to litigate RCRA hazardous waste allegedly disposed at GDC prior to the effective date of the Agreed Order. This is impermissible. Consistent with federal law, the Indiana courts hold that "a prior judgment is conclusive not only as to matters actually litigated, but also as to issues which could have been litigated in the action." Estate of Apple v. Apple, 376 N.E.2d 1172 at 1176. The Supreme Court of

Indiana in McIntosh v. Monroe, 232 Ind. 60, 111 N.E.2d 658, 660 (1953) quoted from its prior decision in Wright v. Anderson, 117 Ind. 349, 20 N.E. 247 (1889) emphasizing that Indiana has long recognized:

> "'An adjudication once had between the parties bars and cuts off all future litigation, not only as to what was actually litigated and determined, but as to all matters that might have been litigated and determined in the action. This is the established doctrine of this court from the beginning.'"

The Indiana Court of Appeals quoted this holding by the Supreme Court in DeLater v. Hudak, 399 N.E.2d 832 at 835 (1980).

Indiana recognizes the applicability of the principles of res judicata to certain administrative determinations. The Court of Appeals of Indiana in South Bend Federation of Teachers v. National Education Assn., 389 N.E.2d 23, 32-33 (1979) held:

> The weight of modern authority in Indiana and elsewhere convinces us that principles of res judicata should apply to certain administrative determinations.
>
> * * *
>
> "and the doctrine of res judicata has been applied to administrative action that has been characterized by the courts as 'adjudicatory,' 'judicial,' or 'quasi-judicial.'"

The effect of Indiana law and of administrative determinations on issue preclusion in actions brought under federal statutes was decided by the United States Court of Appeals for the Seventh Circuit in Bowen v. United States, 570 F.2d 1311 (1978) (reh'g and reh'g en banc denied). Bowen had received a license suspension from the National Transportation Safety Board for violating federal aviation rules by flying an aircraft without de-icing equipment into known icing conditions. He had crashed his

aircraft while attempting to land at an Indiana airport. Later, Bowen brought a court action against U.S. air traffic control personnel alleging they negligently failed to warn him of icing conditions. The Circuit Court ruled that the prior agency suspension decision established Bowen's contributory negligence by collateral estoppel and precluded his recovery under the Federal Tort Claims Act. The Seventh Circuit held in Bowen at 1321-1322:

> In dealing with prior judicial adjudications, the courts have not hesitated in recent years to expand the application of the collateral estoppel, or issue preclusion, branch of the doctrine of res judicata, with which we are concerned here, to better serve the underlying policy on which the doctrine is based, that one opportunity to litigate an issue fully and fairly is enough.
>
> Here the underlying policy, viz., that one fair opportunity to litigate an issue is enough, is best served by the rule that issue preclusion applies to a final administrative determination of an issue properly before an agency acting in a judicial capacity when both parties were aware of the possible significance of the issue in later proceedings and were afforded a fair opportunity to litigate the issue and to obtain judicial review.
>
> * * *
>
> We therefore conclude that, under Indiana law, the plaintiff was estopped from relitigating the issue of whether his conduct violated Federal Aviation Regulations and the underlying fact issues. Because, under that law, the determination of these issues adversely to plaintiff requires the conclusion that he was negligent, and contributory negligence is an absolute bar to recovery, plaintiff could not succeed in his Federal Tort Claims Act suit. (emphasis added)

C. The Language Of RCRA Section 3008 Nowhere Provides EPA With Authority To Enforce State Laws And Regulations

Region V's Complaint states at page 2 at the conclusion of its Section entitled Jurisdiction: "Section 3008(a)(2) of RCRA, 42 USC §6928(a)(2), provides that U.S. EPA may enforce State regulations in those States authorized to administer a hazardous waste program." Nowhere does Section 3008(a)(2) or (a)(1) mention authority being granted to EPA to enforce state regulations. Subsection (a)(2) merely discusses "violation of any requirement of this subtitle" of RCRA. Subsection (a)(1) likewise only discusses "violation of any requirement of this subtitle" of RCRA. There is absolutely no authority granted by Congress for the federal agency to bring an action within the federal agency or with a federal court to enforce state law and regulations. Contrary to Region V's statement, the statute is simply void of language that "U.S. EPA may enforce state regulations," nor does the legislative history of RCRA quoted previously in GDC's Reply Brief directly from the order of the district court in United States v. Conservation Chemical provide that Congress intended EPA to have authority to enforce state laws and regulations in federal forums. Congress merely stated that "where a state is not implementing a hazardous waste program," EPA may "implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements." 5 U.S. Code Cong. & Admin. News at 6269 (1976). How could EPA possibly bring actions to enforce

state hazardous waste laws in a state which has not implemented and enforced a hazardous waste program and where the state program "does not meet the federal minimum requirements"? This is non-sensical. It would mean that EPA would first determine that the state had not implemented a proper program and the program did not meet the minimum requirement, but would then attempt to enforce a non-existing or non-conforming state program. RCRA Section 3008(a) as quoted by the district court in Conservation Chemical states, in its entirety, only:

> COMPLIANCE ORDERS.--(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subtitle, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.
>
> (2) In the case of a violation of any requirement of this subtitle where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 3006, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

Indeed, another RCRA section cited by Region V, 3006(b), provides in its relevant part that state programs will not be authorized if "such program does not provide adequate enforcement of compliance with the requirements of this subtitle." The only other statute cited by Region V to support its jurisdiction is RCRA Section 2002(a)(1) which merely says that the Administrator is authorized to prescribe regulations necessary to carry out his

functions under the Act. Nowhere in this RCRA section does Congress provide the Administrator or the Region with authority to enforce state laws in a federal forum. These three RCRA sections cited by Region V as providing it jurisdiction simply do not even mention authority to enforce state laws.

State laws and state regulations are to be enforced by the state administrative agencies in Indiana forums, and eliminating such would subvert and eliminate a defendant's due process rights to judicial review under the procedures established by the Indiana Administrative Adjudication Act, I.C. 4-22-1 et seq. Indeed, even if one assumes that a federal agency has the right to enforce state laws and regulations, it is axiomatic that the federal agency would also be obligated to follow all of those state laws and regulations including the procedural requirements required by the Indiana Environmental Management Act at I.C. 13-7-11-2 which among other things incorporates all provisions of Indiana's Administrative Adjudication Act, I.C. 4-21.5. How could a federal agency be authorized to enforce the laws and regulations related to a specific state agency and at the same time ignore the obligations and procedures established by those same laws and regulations?

Conclusion

EPA has by its own prior interpretation of RCRA established and previously professed its lack of authority to make determinations as to the applicability of RCRA closure to facilities

and the scope of closure where the state has been granted authority to "carry out such program in lieu of the Federal program." Thus, EPA must dismiss this action unless the Administrator's Order on Reconsideration issued at the midnight hour in the Northside case and the arguments made on its behalf by the United States Justice Department were misinterpretations of the law made as the only means to avoid the consequences of its failure to provide Northside any semblance of due process, but rather only a five minute hearing. No evidence exists in the record to support, nor has EPA contended, that the state of Indiana is not implementing a hazardous waste program or its program does not meet the federal minimum requirements. These are the only exceptions recognized by Congress.

Secondly, EPA must dismiss this cause due to the res judicata and collateral estoppel effects of previous and contemporary state environmental decisions. The privity between EPA and the State is overwhelming. Region V cannot avoid the effects of the state quasi-judicial decisions and orders by professing its ignorance of these prior decisions where it is attempting to enforce state law and regulations on the basis of state inspections, utilizing a state IDEM witness and attempting to require the Respondent to submit plans and assessments for approval by it and by the state. Obviously, if the state of Indiana was directly the Complainant, res judicata and collateral estoppel would be applicable.

Thirdly, nowhere in the statutes cited by Region V to support its jurisdiction is it granted authority by Congress to

enforce state statutes and regulations. Indeed, the legislative history clearly provides for EPA action only where the state has failed to implement a hazardous waste program which meets the federal minimum requirements

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foreoing Reply Brief of Gary Development Company, Inc. upon Marc M. Radell, Assistant Regional Counsel, U. S. Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604; by U.S. Mail, postage prepaid, this 9th day of October, 1987.

_____
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